Commissioner of Income-Tax

Vs

Onkarmal Meghraj (H.U.F.)

Civil Appeals Nos. 2263 to 2274 of 1969

(H. R. Khanna, A. Alagiriswami JJ)

16.08.1973

JUDGMENT

ALAGIRISWAMI J. -

1. Sixteen persons constituted a partnership firm known as M/s. Narayandas Kedarnath under an agreement dated May 19, 1930. Out of the said 16 partners three were outsiders and thirteen were members of three Hindu undivided families whose kartas were respectively Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram. Narayandas Pokarmal had three sons, Govindram, Bhagwandas and Vasudeo; Meghraj Pokarmal had also three sons, Onkarmal, Banarsilal and Beniprasad; and Hanumandas Sewakram had four sons, Kedarnath, Banarsidas, Durgaprasad and Harkisondas. Though the firm consisted of 3 undivided Hindu families the income-tax assessment till the year 1939-40 was on all the sixteen individuals. From 1939-40 to 1941-42 the Income-tax Officer assessed these 13 persons not as individuals but as three Hindu undivided families on the basis of a settlement between them and the department. Thereafter, all the sixteen persons were to be individually assessed. Nevertheless, the Income-tax Officer proceeded to make the assessment as though the three Hindu undivided families still continued. The members of the Hindu undivided families disputed this and the Income-tax Appellate Tribunal by an order dated July 31, 1953, relating to the appeals by the three families for the assessment year 1943-44, directed that the assessment had to be made on each individual partner. In respect of the year 1944-45 the Income-tax Officer had meanwhile assessed the three Hindu undivided families as Hindu undivided families by declaring the cases of the individuals as cases of "No Assessment". These assessments were set aside by the Appellate Assistant Commissioner who followed the directions given by the Tribunal in respect of the year 1943-44 on March 9, 1954.

After the receipt of the orders of the Appellate Assistant Commissioner the Income-tax Officer issued notices under section 34 to all the 13 persons in April, 1954, after obtaining the Commissioner's approval. By that time the Income-tax (Amendment) Act, 1953, which among other things amended section 34(3), had come into effect on May 24, 1953, but had retrospective effect from April 1, 1952. The notices under section 34 were served on or about April 8, 1954, and the assessments were made on January 31, 1955, on the footing that under that section there was no time limit. For the purpose of these assessments the three kartas of the Hindu undivided families, Narayandas, Meghraj and Hanumandas, earlier referred to, and Beniprasad, son of Meghraj, had already filed their returns as individuals and the others as Hindu undivided families. It should be made clear that these are the Hindu undivided families consisting of the other 7 individuals and their descendants, to which we shall hereafter refer as the smaller Hindu undivided families. The Appellate Assistant Commissioner having dismissed their appeals there were 11 appeals to the Tribunal. Banarsidas and Harkisondas, sons of Hanumandas, did not file any appeal.

The Tribunal held that all the eleven cases were governed by section 34(1)(a) and dismissed the appeals. The Tribunal, thereafter, at the instance of the parties referred the following questions to the High Cour :

> (1) Whether, having regard to the direction given by the Appellate Assistant Commissioner in his order dated March 9, 1954, in the case of the appropriate Hindu undivided families and having regard to the second proviso to section 34(3) as amended by section 18 of the Indian Income-tax (Amendment) Act, 1953, the reassessment made by the Income- tax Officer on January 31, 1955, in the case of any one or more of the assessees in governed by any limitation period such as mentioned in the substantive part of section 34(3) ?

In respect of Narayandas Pokarmal, Meghraj Pokarmal, Beniprasad Meghraj and Hanumandas Sewakram the further question referred was:

> (2) Whether in the case of the assessees, the remedy available to the Income-tax Officer had already become time-barred under section 34 before that section was amended in 1953 with retrospective effect from April 1, 1952 ?

Along with these 11 appeals one more appeal by Onkarmal Meghraj regarding the assessment year 1943-44 also was heard by the Tribunal and in that case also the second question was referred to the High Court.

Before the High Court a contention was raised on the basis of the provisions of the Indian Income-tax (Amendment) Act, 1959 (1 of 1959), that notices issued and the action taken in the present cases could not be called in question on the ground that the period prescribed in that behalf had expired. The High Court thereupon called for a supplementary statement of the case. That was forwarded by the Tribunal annexing thereto such record as was indicated by the High Court in its order calling for the supplementary statement. The High Court thereupon framed a further question as follow :

> "Whether section 4 of the Income-tax (Amendment) Act, (1 of 1959) 1959, was applicable to any one or more of these assessments ?"

The High Court held against the department on this question. This was not argued before us and we need not, therefore, spend any further time over it.

For the purpose of deciding whether section 34(3) applied, the High Court went into the question whether the notices in these cases were issued under clause (a) or clause (b) of section 34(1). After considering all the facts and circumstances relevant to the determination of the question the High Court came to the conclusion that the notices issued should be deemed to have been issued under section 34(1)(b). This was based upon the proposal made by the Income- tax Officer, the sanction given by the Commissioner, the notice issued by the Income-tax Officer and the return made by the assessees, as well as the assessment order of the Income-tax Officer. The High Court also came to the same conclusion in respect of the case of Onkarmal Meghraj for the assessment year 1943-44.

It then considered the question whether the case came under the second proviso to section 34(3). The High Court pointed out that neither group could be regarded as falling under section 34(1)(a) and held that the cases of the seven persons could not be treated as cases of no return and that the order of "no assessment" made in respect of these persons was because of a wrong or improper return having been submitted by these assessees, but because of an erroneous view taken by the

Income-tax Officer that the income had to be assessed in the hands of the Hindu undivided families. As regards the second group of four persons it observed that they had submitted their returns as individuals and had fully and truly disclosed the income received by them, which was liable to assessment. The Income-tax Officer had, however, made the assessment on three Hindu undivided families represented by three of the four persons and assessed the income s the income of the Hindu undivided families. The result was not because of a failure or omission on the part of these persons to make a return of their respective income, but because the income was assessed in the hands of the Hindu undivided families. Thus the escapement of assessment of income was not due to the any failure or omission on the part of the assessees but because of the erroneous view taken by the Income-tax Officer. It thus held that the cases did not fall under section 34(1)(a) and that they could not fall under the second proviso to section 34(3) because that proviso became applicable only from the April 1, 1952, and the assessment under section 34 being in respect of the assessment year 1944-45, the action to be taken under section 34 would be barred. The same view was taken in the case of the solitary appeal of Onkarmal Meghraj for the assessment year 1943-44. Even in respect of Narayandas, Meghraj and Hanumandas it observed that although they were undoubtedly parties to the proceedings in which the findings or orders were given, and the second proviso to section 34(3) would not be inapplicable but it could be applied only within the period of limitation that had expired before April 1, 1952. In the result the High Court answered two of the questions in the affirmative. The Commissioner of Income-tax has, therefore, filed these 12 appeals.

It appears to us that the conclusion reached by the High Court in respect of the question whether clause (a) or clause (b) of section 34(1) applies is correct. Neither the proposal submitted by the Income-tax Officer to the Commissioner taking action under section 34 nor the sanction of the commissioner nor the notices issued in these cases nor the returns filed by the parties nor even the assessment order of the Income-tax Officer point to the conclusion that action was either contemplated or taken under clause (a). It has to be kept in mind that all the eleven persons had filed their returns in their status as individuals. The fact that seven of them filed as smaller Hindu undivided families makes no difference to this fact. The larger Hindu undivided family of Narayandas, Meghraj and Hanumandas was neither in existence nor did it file a return as such. Indeed, from the year 1930 it never existed. The assessment for 1939-40 to 1941-42 of the three Hindu undivided families was only by agreement between the parties and the three Hindu undivided families was only by agreement between the parties and the department and was not questioned. The assessment for 1942-43 was somehow not taken up on appeal. The direction given by the Tribunal on July 31, 1953, was in respect of the assessment for 1943-44. The Income-tax Officer had even before that date assessed the three units as Hindu undivided families for 1944-45 and passed an order of "No Assessment" in respect of the individuals. For that year also all of them had filed their returns as individuals. Clearly, therefore, there was no question of omission or failure to make a return or to disclose fully and truly all material facts necessary for their assessment and the escapement of assessment was not due to any such fact but due to the action of the Income-tax Officer assessing non-existent Hindu undivided families and passing an order of "No Assessment" in respect of individuals. Section 34(1)(a) cannot, therefore, apply and only section 34(1)(b) can apply.

The second proviso to section 34(3) does not apply to eight of the 11 respondents in the appeals regarding the assessment year 1944-45, as they were not parties to the proceedings in which the direction of the Tribunal was given, and the same consideration applies to the respondent, Onkarmal Meghraj, for the assessment year 1943-44. Only Narayandas, Meghraj and Hanumandas who had filed returns as individuals but who had been assessed as Hindu undivided families were parties thereto. The others had no occasion to go up in appeal because the Income-tax Officer had passed an order of "No Assessment " in their cases. Regarding the assessment for the year 1943-44, the

assessments were made in pursuance of the directions given by the Appellate Assistant Commissioner in the three appeals preferred by the persons who were treated as kartas of the three Hindu undivided families in whose hands the income was assessed by the Income-tax Officer. These were Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram. In these cases the settlement between the department and the parties earlier was on the basis that there was partial partition in the Hindu undivided families. It has already been mentioned that before the year 1939-40 the various partners of the firm had been assessed in their individual capacities. Therefore, the appeals filed by Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram cannot represent the separated members of the family. These three persons, however, were parties to the said proceedings. They had filed their returns as individuals and because they had been assessed as Hindu undivided families, had carried the matter up on appeal. In respect of the other eight persons who also filed returns as individuals the direction issued by the Appellate Assistant Commissioner in the appeals field by Narayandas, Onkarmal and Hanumandas cannot be said to apply to them as there was no Hindu undivided family and they were not members of a Hindu undivided family. The words "any person" in the second proviso to section 34(3) has been interpreted by this court in Income-tax Officer v. Murlidhar Bhagwan Das, as any person intimately connected like members of a Hindu undivided family, partners of a firm or individuals forming an association of individuals because in such cases though they are not nominee parties they could be deemed to be represented by the Hindu undivided family, partnership or association before the relevant income-tax authority - indeed, there was no Hindu undivided family - and, therefore, they would not be bound by those orders. In the case of individuals who were actually before the Appellate Assistant Commissioner and the Tribunal the orders would bind those three individuals. In their cases, therefore, the second proviso can be rightly applied.

We have no held that the notices in these cases should be deemed to have been issued under section 34(1)(b) and the orders of the Tribunal and the Appellate Assistant Commissioner would apply to the three persons who were nominee parties before them but not others. The next question is whether the bar of limitation applies in any of the cases. A good deal of argument was advanced before us as to whether the second proviso to section 34(3) could be availed of at any time. It appears to us that it could be so availed of an respect of persons in whose cases reassessments are made under section 27 or in pursuance of an order under section 31, 33A, 33B, 66 or 66A, that is Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram. There is no difficulty in holding that the second proviso applies to them. They had filed their returns as individuals and been assessed as Hindu undivided families. It is open to persons in that situation to contend, as indeed they did, that they should be assessed as individuals and not as Hindu undivided families. And when the Appellate Assistant Commissioner and the Tribunal make an order that they should not be assessed as Hindu undivided families but as individuals they are only giving effect to the contention of the parties. Their cases come directly under the principle of the decision in Income-tax Officer v. Murlidhar Bhagwan Das. Even if they are not assessees, that are intimately connected with assessees, that is, the Hindu undivided family. The earlier order of "No Assessment" made by the Income-tax Officer in their cases does not affect this situation.

But, as far as the other eight persons are concerned, they did not have anything further to do after the Income-tax Officer in spite of their filing returns as individuals made an order of "No Assessment ". They were not before the Appellate Assistant Commissioner or the Tribunal. They were not assessees nor were they intimately connected with the assessee that is the Hindu undivided family as there was no Hindu undivided family. Therefore, the second proviso to section 34(3) is not applicable in their cases. The right of the Income-tax Officer to assess these persons can be upheld only if the notice under the substantive part of section 34 can be said to be a valid notice. The

assessment year being 1944-45, the notice under section 34 issued in April, 1954, was beyond the period of 4 years under section 34(1)(b) which we have held applies to them. For the reasons just set forth the second proviso to section 34(3) does not apply to them.

That raises the question whether that proviso could be applied without reference to any period of limitation. It is a well-settled principle that no action can be commenced where the period within which it can be commenced has expired. It is unnecessary to cite authorities in support of this position. Does the fact that the second proviso says that there is no period of limitation make a difference ? The first thing to be noticed is that that provision was given retrospective effect only from April 1, 1952, though the Income-tax (Amendment) Act came into effect from May 24, 1953. Where it is intended that the retrospective effect should be without any limit it is usual and proper to provide that the amendment would have effect and would be deemed always to have had effect as if it had been part of the Act from its inception. That that was not done shows that the intention was only to give limited retrospective effect, that is to say, there would be no bar of limitation if it had not expired before April 1, 1952.

We will not refer to some of the decisions which were relied upon. In S. C. Prashar v. Vasantsen Dwarkadas the effect of the amendment made to section 34 were considered by the Bombay High Court. A Bench of that High Court consisting of Chagla C.J. and Tendolkar J. held that where the period mentioned in the substantive part of section 34 had expired before the amendment in 1953, i.e., before April 1, 1952, no action can be taken under that section. The court also took the view that the second proviso to section third parties. That question has now been at rest by the decision of this court in Income-tax Officer v. Murlidhar Bhagwan Das. as already noticed. In this court of the five Judge who heard the appeal in Prashar v. Vasantsen Dwarkadas two of the Judges, Das J. and Kapur J., held that section 31 of the Income-tax (Amendment) Act, 1953, did not operate as regards assessment years for which assessment or reassessment was barred before April 1, 1952, in accordance with section 34 before it was amended in 1948. Hidayatullah J. and Raghubar Dayal J. took the contrary view. Sarkar J. expressed no opinion on the point. In J. P. Jani, Income-tax Officer v. Induprasad Devshankar Bhatt. this court held that the Income-tax Officer cannot issue notice under section 148 of the Income-tax Act, 1961, in order to reopen the assessment of an assessee in a case where the right to reopen the assessment was barred under the 1922 Act at the data when the new Act came into force. It was held that section 297(2)(d)(ii) of the 1961 Act was applicable only to those cases where the right of the Income-tax Officer to reopen an assessment was not barred under the repealed Act. This decision is broadly in the line with the opinion of Das and Kapur JJ. in Prashar's case. The decision of this court relied upon by the appellant, in Income-tax Officer v. T. S. Devinatha Nadar. Which was a case under section 35(5), which was introduced into the Income-tax Act by the 1953 amendment at the same time as the amendment to section 34 does not really affect this position. This court observe :

> "As we have already said, sub-section (5) becomes operative as soon as it is found on the assessment or reassessment of the firm or on any reduction or enhancement made in the income of the firm that the share of the partners in the profit or loss of the firm had not been included in the in the assessment of the partner or if included was not correct. The completion of the assessment of the partner as an individual need not happen after April 1, 1952. The completed assessment of the partner is the subject matter of rectification and this may have preceded the above-mentioned date. Such completion does not control the operation of the sub-section. In the result we find ourselves unable to concur in the decision or the reasoning in Atmala Nagaraj's case."

The position can, therefore, be said to have been satisfactorily established that the effect of the amendment of section 34 in 1953 is not to enable the Income-tax Officer to take action under that section where the period mentioned therein had expired before April 1, 1952. That would apply in these cases to persons other than Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram. In their cases the second proviso to section 34(3) would apply, whether it is the old proviso or the proviso introduced in 1953.

In the result, Civil Appeals Nos. 2264 of 1969, 2268 of 1969 and 2272 of 1969 are allowed with costs. The other 9 appeals are dismissed with costs.

</html